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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-508

GTE SYLVANIA, INCORPORATED, RCA CORPORATION, THE MAGNAVOX COMPANY, ZENITH RADIO CORPORATION, MOTOROLA, INC., WARWICK ELECTRONICS, INC., AERONAUTIC FORD CORPORATION, MATSUSHITA ELECTRIC CORPORATION OF AMERICA, SHARP ELECTRONIC CORPORATION, TOSHIBA-AMERICA, INC., GENERAL ELECTRIC COMPANY, ADMIRAL CORPORATION,

Petitioners,

v.

CONSUMERS UNION OF THE UNITED STATES, INC., PUBLIC CITIZEN'S HEALTH RESEARCH GROUP, CONSUMER PRODUCT SAFETY COMMISSION, RICHARD O. SIMPSON, BARBARA H. FRANKLIN, LAWRENCE KUSHNER, CONSTANCE NEWMAN, R. DAVID PITTLE, SADYE DUNN,

Respondents.

MEMORANDUM OF THE RESPONDENTS CONSUMERS UNION OF THE UNITED STATES, INC. AND PUBLIC CITIZEN'S HEALTH RESEARCH GROUP IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the Court of Appeals (1a-16a) is now reported at 561 F.2d 349.[1] The orders denying rehearing and rehearing *en banc* (71a-74a) are not officially reported.

[1] References to the Appendix filed with the Petition are designated "a."

QUESTION PRESENTED

Did the Court of Appeals correctly determine that a "case or controversy" existed under Article III of the Constitution in this Freedom of Information Act case in which all of the interested parties were before the United States District Court for the District of Columbia, and only that Court, and that there was no basis under the facts of this case for the District Court to delay proceeding to the merits of this controversy?

STATEMENT OF THE CASE

In this action under the Freedom of Information Act, as amended, 5 U.S.C. § 552 ("FOIA"), plaintiffs-respondents Consumers Union of the United States, Inc. and Public Citizen's Health Research Group (hereinafter "plaintiffs"/"requesters") seek access to reports on television accidents which are in the possession of the respondents Consumer Product Safety Commission and its members (referred to jointly as "CPSC"). Those reports were submitted to the CPSC by twelve manufacturers of television sets who are the petitioners in this Court and who were joined with the CPSC as defendants in this action (the "manufacturers").

The genesis of this case was a May 1974 order issued by the CPSC to the manufacturers requesting that they submit all accident reports collected by them since the National Commission on Product Safety held certain hearings in 1969. The CPSC also invited the manufacturers to indicate their views as to whether any of the submitted reports were entitled to exemption from disclosure under the FOIA. In June 1974, the requesters sought access under the FOIA to the documents submitted by the manufacturers in response to the CPSC's order. With the exception of a few reports

from manufacturers who did not seek confidentiality, the CPSC initially denied the request, but directed the manufacturers to substantiate their claims of confidentiality, Subsequently, plaintiffs' request was narrowed to exclude entirely documents protected by the attorney-client privilege or the work product doctrine, as well as those portions of documents containing the names and addresses of accident victims.

In October 1974, when no final determination had yet been made, requesters informed the CPSC that any further delay would be considered a denial of their request under the FOIA. As a result, representatives of the requesters and the CPSC met and agreed upon a timetable for the CPSC's review of the submissions, with a scheduled completion date of mid-March 1975.

On March 28, 1975, the CPSC issued its determination that the documents requested did not fall within any of the FOIA exemptions, but that even if some of them were exempt, it would exercise its discretion to disclose those documents in view of the important public health and safety interest in the information. The CPSC notified the manufacturers of this decision and advised them that it would withhold disclosure only until May 1, 1975.

In response to that notice, seven separate actions were filed by manufacturers against the CPSC in the United States District Court for the District of Delaware, each seeking an injunction prohibiting disclosure on the grounds that the release of the documents is barred by the exemptions to the FOIA, 5 U.S.C. §§ 552(b)(3) and (4), and by certain provisions of the Consumer Product Safety Act, 15 U.S.C. § 2055. Similar actions were filed by five other manufacturers in the United States District Courts for the Southern District of New York, Northern District of New York, and the Western District of Pennsylvania.

In each of these actions, all of which were commenced prior to May 1, temporary restraining orders were sought to prevent the release of the documents pending a determination of a motion for a preliminary injunction. After the CPSC consented to a temporary restraining order in most of the cases, and after such orders were granted without CPSC opposition in the others, the instant action was filed on May 5, 1975, in the United States District Court for the District of Columbia, naming both the CPSC and the twelve manufacturers who had brought suit as defendants.

Thereafter, all of the actions brought by the manufacturers were consolidated in the District of Delaware (the State of incorporation for each of the manufacturers), although none of them had their principal place of business there. Without objection from the CPSC, the temporary restraining orders were continued in effect until July 23rd, when oral argument was held on the motions for preliminary injunctions, and then until October 23, 1975, when the Delaware District Court granted the motions of the manufacturers for a preliminary injunction. Although all the parties in the Delaware cases were parties to the District of Columbia action, neither the manufacturers nor the CPSC sought to join the requesters as parties in Delaware under Rule 19, nor did the complaints allege any reason for non-joinder, nor was any attempt made under 28 U.S.C. § 1404(a) to transfer those cases to a forum where the requesters could readily be joined. Moreover, even though the submissions by the CPSC in Delaware plainly put that Court on notice of the interest of the requesters in the release of the documents,[2]

[2] *See GTE Sylvania, Inc. v. Consumer Product Safety Comm.*, 404 F. Supp. 352, 369 n.73 (D. Del. 1975).

that Court did not on its own motion inquire about the necessity of joining the requesters under Rule 19.

Meanwhile, in the action in the District of Columbia, the defendants – both the CPSC and the manufacturers – moved to dismiss on the ground that no case or controversy existed between the requesters and the CPSC, or in the alternative to stay all proceedings there pending a decision in Delaware. Their position was that since the manufacturers had won the race to the courthouse, and since the CPSC agreed with the requesters on the legal issues regarding the absence of an available FOIA exemption, the requesters should be required to rely on the allegedly adequate representation of their interests by the CPSC in Delaware. Moreover, they argued, there was insufficient adversity between the CPSC and the requesters to sustain the Article III requirement of a case or controversy. The District Court agreed, and on September 11, 1975, filed an opinion and entered an order dismissing the action for lack of a "case or controversy" between the requesters and the CPSC, and for absence of an independent cause of action and independent basis of subject matter jurisdiction between the requesters and the manufacturers. (75a-86a).

On appeal, a unanimous panel of the United States Court of Appeals for the District of Columbia Circuit reversed and remanded the case for proceedings on the merits of plaintiffs' FOIA complaint. The Court first reviewed the facts as they existed at the time of the District Court's decision, and noted that, subsequently, a preliminary injunction had been granted, the CPSC had filed a notice of appeal which it then withdrew, and the Delaware Court had apparently "closed out" the actions there by an August 20, 1976 order. (7a-8a). More importantly, the Court found that

> despite full awareness of appellants' requests for access to the documents, neither the manufacturers nor the Commission even attempted to include appellants as parties or to transfer the cases to the District of Columbia where appellants could readily be joined. Furthermore, though the submissions by the Commission in Delaware plainly put that court on notice of the interest of appellants in release of the documents, the Court did not on its own motion inquire about the necessity of joining appellants under Rule 19, Fed. R. Civ. P. (7a).

The opinion then analyzed the decision in the trial court and found that the "substantial and extensively argued disagreement among the parties to this action fully satisfies the Article III case or controversy requirement." (9a). After examining the course of the litigation in Delaware in light of the Article III requirements, it concluded on the basis of the record that "we cannot believe that the Commission and the appellants lack the degree of adverseness necessary under the Constitution." (11a).

As to the question of whether the action should proceed in the District of Columbia or be stayed pending the outcome in Delaware, the Court observed that the preliminary injunction alone "could not bar the FOIA action instituted by appellants in the District of Columbia." (13a). Although recognizing that the injunction would "weigh heavily" in deciding which suit ought to proceed (*id.*), the Court of Appeals noted that there had been no appeal taken from the entry of the preliminary injunction and no action taken to make the injunction permanent during the succeeding interval of almost two years time. It found these factors to be

strong reasons in support of permitting the requesters to proceed with their action in the District of Columbia, a position the Court also supported with its observations that the CPSC was "less than vigilant in espousing its putative view that the requested documents should be disclosed" and that there was an "absence from the Delaware proceedings of any party requesting disclosure." (15a). Having thus analyzed all of the relevant circumstances, it directed that under the facts of this case, where there was a case or controversy in the District of Columbia and all of the interested parties were before that Court, the District Court should proceed to decide the merits and not await the result in Delaware.

Both the manufacturers and CPSC requested rehearing and suggested a rehearing *en banc*. They pointed out that the case in Delaware was "closed out" only "for statistical purposes" (48a-49a; 57a-58a). As if to underscore this point, immediately after the Court of Appeals issued its opinion in July 1977, the manufacturers initiated proceedings designed to make the preliminary injunction permanent. (49a-50a; 59a). In connection with those revived proceedings, the CPSC for the first time moved to transfer the Delaware actions to the District of Columbia, a request that was denied in view of the more than two years that had elapsed since those actions had been consolidated in Delaware. On August 25, 1977, the petitions for rehearing were denied for reasons stated in a *per curiam* memorandum. (71a-73a). In it the Court pointed out the continued absence of the requesters from the Delaware litigation in spite of the requirements of Rule 19. It further observed that since all of the relevant parties were present in the District of Columbia, where venue was plainly proper under the FOIA, the action should proceed in that forum, particularly in view of the FOIA's mandate that all proceedings be expedited.

THE WRIT SHOULD BE DENIED

The decision of the Court of Appeals is plainly correct in its conclusion that the requirements of Article III of the Constitution have been met. This is a three-cornered dispute in which all three interested sets of parties are present in this action brought in the District of Columbia. This Court's statement as to the scope of Article III – that "the business of the Federal courts should be limited to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process"[3] – was certainly met by the very real conflict present among the parties to this lawsuit. The principal decisions relied upon by petitioners, *Moore v. Charlotte-Mecklenburg Board of Educ.*, 402 U.S. 37 (1971), and *Muskrat v. United States*, 219 U.S. 346, 361-62 (1911), are readily distinguishable since in both of those cases the only parties to the lawsuits were in agreement as to their outcome, whereas the presence of the manufacturers in this instance insures the adverseness required to satisfy Article III. As the Court of Appeals recognized, the requesting parties want the documents and their inability to obtain them without a lawsuit is sufficient to meet the requirements of a constitutional case or controversy.

Petitioners suggest, however, that there is a potential conflict between the decision below and what is transpiring in Delaware. The short answer is that no present conflict exists, and it is by no means certain that there will ever be any since the Delaware Court may rule for the CPSC. More importantly, if there is a conflict, the District of Columbia, not Delaware, is the proper place to resolve it since all of the interested parties are present in the District of Columbia Court and only in that Court.

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[3] *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

As this Court has observed in a similar situation involving the non-joinder of parties, "[o]f course, since the outsider is not before the court, he cannot be bound by the judgment rendered." *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 110 (1968). And if the CPSC and the manufacturers complain of duplicative litigation, the answer was supplied by the Sixth Circuit in *Boles v. Greenville Housing Authority*, 468 F.2d 476, 479 (1972): "Any hardship suffered by the appellants is attributable to their own failure to bring [an interested person] into the case as a party."

That position is reinforced by the reasonableness of the conduct of the requesters in this instance. Although the CPSC's failure to provide a timely response to their request would have permitted the requesters to file suit early on – and thereby win what the manufacturers view as the all-important race to the courthouse – the requesters hoped to avoid unnecessary litigation by negotiating with the CPSC to obtain the release of the important health and safety data at issue. Once the CPSC ruled in their favor in March 1975, there was no basis for a lawsuit until the May 1st release date had been reached. Thereafter, while the requesters could have sought to intervene in the consolidated Delaware actions, it would have meant litigating in an inconvenient, and perhaps hostile forum, as well as surrendering their right to move to transfer under 28 U.S.C. § 1404(a). *See, e.g., Commonwealth Edison Co. v. Train*, 71 F.R.D. 391, 394 (N.D. Ill. 1976). By intervening in Delaware, plaintiffs would have also been forced to relinquish the liberal rights which the FOIA grants to requesting parties to bring suits in the forums of their choice. 5 U.S.C. § 552(a)(4). While the inconvenience of going to Delaware may not have been insurmountable in this case, the next action could easily

have been brought in California, making litigation impossible as a practical matter.[4]

Therefore, the requesters chose to bring their own lawsuit, but in doing so did what none of the other parties had thought to do: to insure the necessary joinder of all interested persons by naming the manufacturers, and not simply the CPSC, as parties defendant. Even after this action was brought in the District of Columbia, the CPSC failed to file motions in the Delaware proceedings under Rule 19 or under section 1404(a), nor did the Delaware court inquire about the non-joinder of the requesters there. Instead, the CPSC sought to deprive the requesters of their preferred forum by moving to dismiss the District of Columbia action with the intention of forcing the requesters to go to Delaware or abandon their claim. The Court of Appeals said only that the requesters can proceed to the merits in the District of Columbia, a ruling that presents no issue requiring review by this Court.

Apart from the government's failure to preserve the rights of the requesters as necessary parties, there are other facts which demonstrate conclusively that the interests of the requesters were not being adequately represented in Delaware by the CPSC. Once the preliminary injunction was granted in October 1975, the CPSC could have appealed that ruling, which was largely based on an interpretation of the applicable law, or it could have sought to obtain a final decision from which an appeal could be taken without being disadvantaged by any discretionary

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[4] In fact, in *Westinghouse Electric Corp. v. Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977), the requesting party was the Legal Aid Society of Alameda County, California, yet Westinghouse was able to force the Society to come to Virginia to protect its interests.

factors favoring the manufacturers. It chose to do neither. In fact, until the Court of Appeals issued its ruling in July 1977, almost 21 months after the entry of the preliminary injunction, the CPSC had done nothing to further its alleged desire to release the requested documents. This failure is particularly noteworthy in view of the fact that in September 1976, Congress amended exemption 3 of the Freedom of Information Act to substantially reduce the basis upon which an agency may rely on other statutes to withhold disclosure.[5] Despite that change, which went to the heart of the manufacturers' claims, the CPSC did absolutely nothing to move the Delaware actions ahead. In view of all of these circumstances and the fact that it has now been almost three and a half years since plaintiffs' information request was made, the Court of Appeals was surely not in error in ruling that plaintiffs had a right to go to court to obtain a determination of their claim and that the District of Columbia was a proper place to decide the questions presented.

Petitioners, however, urge this Court to review the decision of the Court of Appeals that this case should proceed to the merits rather than awaiting the outcome in Delaware. They do not suggest any uniquely important questions presented by that ruling, which we believe is correct, but which is, in any event, dependent on the facts of this particular case. As we have demonstrated above, the Court of Appeals acted well within its powers in directing that the action in the District of Columbia go forward since the requesting parties would not be bound by the Delaware action even if it proceeded to judgment first, *Provident Tradesmens Bank & Trust Co. v. Patterson, supra,* particu-

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[5] Government in the Sunshine Act, section 5(b), Pub. L. 94-409, 90 Stat. 1241.

larly since the parties in Delaware made no attempt to join the requesters there. While the manufacturers argue that these proceedings must nevertheless be stayed since theirs was the first suit filed, the "first to file" rule is only a general, not a universal requirement, and should not be given primacy in FOIA actions where the statute is particularly solicitous of the rights of requesting parties insofar as choice of forums and right to expedition is concerned. In any event, the ruling by the Court of Appeals on the issue of the appropriateness of proceeding to the merits of this action surely does not warrant plenary consideration by this Court.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

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